

**U.S. DISTRICT COURT FOR WESTERN DISTRICT
OF PENNSYLVANIA**

WARREN DURHAM, JR.,

CIVIL ACTION

Plaintiff,

No.: 04-297E

-vs-

Judge Sean J. McLaughlin/Magistrate Judge
Susan Paradise Baxter

CITY OF ERIE, PENNSYLVANIA,
COUNTY OF ERIE, PENNSYLVANIA,
CHRISTOPHER McELYNN, BRUCE
TACKETT, JAMES WASHBURN,
PATRICK DURKIN, and FRED P.
ANTHONY,

Defendants.

MOTION FOR SUMMARY JUDGMENT

AND NOW, come the Defendants, City of Erie, James Washburn and Patrick Durkin, by and through their counsel, Law Office of Joseph S. Weimer and Edmond R. Joyal, Jr., Esquire, and files the following Motion for Summary Judgment.

I. FACTUAL SUMMARY

The case was brought on behalf of the Plaintiff, Warren Durham, Jr., pro se, alleging that his civil rights were violated as the result of the investigation of a sexual assault. Mr. Durham was arrested by the City of Erie police after a female reported a rape and gave a description of a man who was the alleged perpetrator. In addition, to the description, which Mr. Durham admits was his at the time, she gave police a vehicle license number, a location at which the vehicle might be found and the description of a handgun allegedly used during the assault.

The police broadcast all of the information over its radio system. The vehicle was located and the license plate was an Ohio registration. This vehicle was registered to plaintiff, Warren Durham, Jr. The police went to the scene where the vehicle was and a male fitting the

description of Mr. Durham was seen on the porch of a residence. It was determined that the residence was owned by Donald Durham, the brother of the plaintiff, Warren Durham, Jr.

The alleged victim was brought to the scene by police and she positively identified Warren Durham, Jr. as her assailant. Mr. Durham was arrested and various search warrants were obtained by police, including warrants for the taking of DNA samples from Durham as well as search warrants for the vehicle and the home.

These warrants were issued by a District Magistrate and were served on the defendant as well as on the residence. The residence was searched by police after obtaining the warrants and an inventory was taken of items seized. The warrant on the home was served at a time when the owner was not present and the police made entry after announcing their presence on more than one occasion.

Mr. Durham was tried and convicted. During the trial, DNA evidence was submitted which found that there was a one in five and a half billion chance that the sample did not match the plaintiff in this case. During the trial, Durham was identified by the victim as was the gun found in the home. He was convicted and sentence to prison.

Mr. Durham appealed his conviction to the Federal Courts alleging constitutional violations during the course of the trial. A new trial was ordered by the Court and he was subsequently found not guilty.

Mr. Durham has filed many suits in this Court against various persons associated with the trial. This Court has dismissed allegations against many of the other defendants. Only these Defendants and Bruce Tackett remain as defendants in this case at this time.

These Defendants seek summary judgment in this matter in their favor on the following grounds:

1. Plaintiff has failed to state a claim upon which relief can be granted in that there was probable cause for his arrest and prosecution.
2. The Defendants are protected by qualified immunity.
3. Defendants respectfully submit that there is no genuine issue of material fact and that they are entitled to judgment as a matter of law.

LAW OFFICE OF JOSEPH S. WEIMER

BY: /s/Edmond R. Joyal, Jr.

Edmond R. Joyal, Jr., Esquire
Pa. I.D. #65907
Attorney for Defendants, City of Erie,
James Washburn and Patrick Durkin
975 Two Chatham Center
Pittsburgh, PA 15219
(412) 338-3098

CERTIFICATE OF SERVICE

I, Edmond R. Joyal, Jr., Esquire hereby certify that a true and correct copy of the foregoing MOTION FOR SUMMARY JUDGMENT has been served via electronic transmission and First Class Mail, postage pre-paid, upon the following parties on this 13th day of July, 2006.

Warren Durham, Jr.
12119 Matherson Avenue
Cleveland, OH 44135
(Pro Se Plaintiff)

A. Taylor Williams, Esquire
Administrative Office of Pennsylvania Courts
1515 Market Street, Suite 1414
Philadelphia, PA 19102
(Counsel for Defendant, Judge Fred P. Anthony)

Kemal Alexander Mericli
Office of the Attorney General
Civil Litigation Section
564 Forbes Avenue
6th Floor, Manor Complex
Pittsburgh, PA 15219
(Counsel for Defendant, Bruce Tackett)

LAW OFFICE OF JOSEPH S. WEIMER

BY: /s/Edmond R. Joyal, Jr.

Edmond R. Joyal, Jr., Esquire
Pa. I.D. #65907
Attorney for Defendants, James
Washburn and Patrick Durkin
975 Two Chatham Center
Pittsburgh, PA 15219
(412) 338-3098